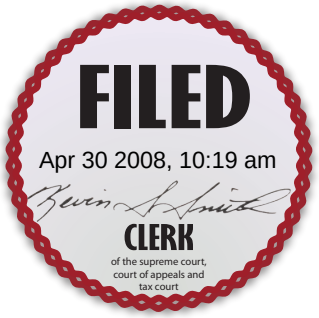

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL L. SCHIDLER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A05-0708-PC-439
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0704-PC-6

April 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Michael L. Schidler, pro se, appeals the post-conviction court's denial of his request for post-conviction relief, filed after he pleaded guilty to four counts of Child Molesting, as Class A felonies, and one count of Possession of Methamphetamine, as a Class D felony. Schidler presents the following issues for review:

1. Whether Schidler's trial counsel was ineffective for failing to inform Schidler of a more favorable plea bargain, waiving the right to assert certain mitigators, and failing to investigate and interview witnesses.

2. Whether Schidler's appellate counsel was ineffective for failing to raise the claim of ineffective assistance of trial counsel.

3. Whether the prosecutor's striking by pen of certain charges on the charging information at the guilty plea hearing violated Schidler's due process rights.

4. Whether the imposition of consecutive sentences violates Schidler's due process rights.

We affirm.

FACTS AND PROCEDURAL HISTORY

The relevant facts are set out in our memorandum decision issued in Schidler's direct appeal:

> On June 28, 2005, Schidler was charged with nineteen counts of child molesting, a class A felony, two counts of child molesting, a class C felony, one count of possession of methamphetamine within 1000 feet of a school, a class B felony, one count of possession of marijuana, a class A misdemeanor, and one count of possession of paraphernalia, a class A misdemeanor. The State alleged that Schidler molested his two minor step-daughters, ten-year-old S.E., and seven-year-old A.E. "[o]n or about 2004 to 2005." Appellant's App. p. 6-27. The class A felony child molesting offenses involving S.E. included counts I-VIII and counts XVI-XX, whereas the offenses committed against A.E. were alleged in counts X - XVI. The State further alleged that Schidler committed the drug offenses "[o]n or about June 22, 2005." Id. at 27-29.

> On March 7, 2006, Schidler appeared for trial. After the jury was sworn, and just prior to the presentation of evidence, Schidler agreed to plead guilty to the four counts of class A felony child molesting alleged in counts I, VI, XI and XVI and to possession of methamphetamine as a class D felony in exchange for the State's dismissal of the remaining charges. The State and Schidler agreed that sentencing would be left to the trial court's discretion.
>
> At the sentencing hearing on April 21, 2006, the trial court determined that Schidler should serve an aggregate 120-year executed sentence. Specifically, Schidler was sentenced to thirty-year consecutive sentences on each of the four child molesting counts, and to one and one-half years on the possession of methamphetamine charge, with the molestation and methamphetamine sentences to run concurrently. In support of the sentence, the trial court identified the following aggravating circumstances: (1) Schidler violated the victims' trust; (2) the nature and circumstances of the offense; and (3) an imposition of less than the presumptive sentence would diminish the seriousness of the offenses.[]
>
> The trial court commented that the circumstances of the crimes were especially heinous because Schidler molested two children over a lengthy period of time within the context of an ostensibly loving relationship. The trial court then identified Schidler's lack of criminal history and his decision to plead guilty as mitigating factors. The trial court afforded little mitigating weight to the guilty plea because the jury had been sworn and the children had already been subjected to testifying about the crimes prior to trial. . . .

Schidler v. State, No. 79D02-0506-FA-14 (Ind. Ct. App. Jan. 10, 2007) ("Schidler I").

In Schidler I, this court held that Schidler's 120-year sentence was inappropriate in light of his character and the nature of the offenses. Id. at 9. As a result, we remanded the case with instructions for the trial court to issue an amended order sentencing Schidler to the presumptive thirty-year term on each child molesting count, two of those sentences to be served consecutively and the remainder of the sentences to be served concurrently, for an aggregate sentence of sixty years. Id.

On April 19, 2007, Schidler filed his pro se petition for post-conviction relief, alleging ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and violation of his due process rights in sentencing. The post-conviction court denied the petition without a hearing. Schidler now appeals.

DISCUSSION AND DECISION

Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error, that which leaves us with a definite and firm conviction that a mistake has been made. Id. (citations omitted). In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. Id.

Issue One: Ineffective Assistance of Trial Counsel

Schidler contends that his trial counsel was ineffective. A defendant claiming ineffective assistance of trial counsel must satisfy two components. Clancy v. State, 829 N.E.2d 203, 212 (Ind. Ct. App. 2005), trans. denied. "First, the defendant must show deficient performance: representation that fell below an objective standard of

reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." Id. (quoting McCary v. State, 761 N.E.2d 389, 392 (Ind. 2002) (citing Strickland v. Washington, 466 U.S. 668 (1984))). Second, the defendant must show prejudice: a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. Further, we afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Id. Where trial counsel's performance at issue can be explained by reasonable trial strategy, that performance is not ineffective. See id. The failure to establish either prong will cause the claim to fail. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999).

Schidler asserts four reasons that his trial counsel was ineffective. Specifically, he alleges that trial counsel failed to: (1) inform him of a more favorable plea agreement before advising him to enter a guilty plea; (2) argue as a mitigator Schidler's "excellent employment history,"[1] Appellant's Brief at 4; and (3) adequately investigate and interview witnesses in Schidler's case. We address each contention in turn.

Schidler first argues that his trial counsel was ineffective because he did not "inform [Schidler] of a more favorable plea bargain of Class[]C felonies before advising [Schidler] to enter a guilty plea to Class[]A felonies" pursuant to a plea agreement. Id. But Schidler does not provide citations to the record demonstrating the existence of

[1] Schidler does not explain why his employment history should be deemed excellent, but the pre-sentence investigation report shows that he was consistently employed by one of six different employers between 1996 and 2005, when he was arrested for the offenses for which he was convicted below.

another plea agreement, nor does he support that argument with cogent reasoning. Thus, Schidler has waived the issue for review.[2] See Ind. Appellate Rule 46(A)(8)(a).

Schidler next contends that his trial counsel was ineffective for failing to raise as a mitigator Schidler's "excellent" employment history. Appellant's Brief at 4. In support, Schidler states that he had a "right to assert all mitigating factors during sentencing" but his trial counsel failed to "vigorously argue [Schidler's] excellent employment history in an effort to have all of [Schidler's] sentences [run] concurrently." Id. But, again, Schidler does not provide cogent reasoning or citations to the record or relevant law to support that argument. Thus, he has waived the argument for review. See App. R. 46(A)(8)(a).

Schidler also contends that his trial counsel was ineffective because he relied solely upon the State's evidence. Specifically, he argues that, "had trial counsel performed an independent investigation of the State's evidence, trial counsel would have been aware that the test results from Wishard Health Services were **negative** as [sic] for penetration of the victims' vagina [sic] and would not have advised, nor allowed, [Schidler] to enter a guilty plea on such evidence." Appellant's Brief at 4 (emphasis in original). In support Schidler cites to two medical reports, which document lab testing for sexually transmitted diseases in the victims. But those test reports do not reference whether penetration had occurred. As such, trial counsel's performance was not deficient

[2] Schidler's claim may have been founded on a clerical error in the record. Our review discloses that the trial court initially signed a guilty plea order, which indicated that Schidler had pleaded guilty to four counts of child molesting, as Class C felonies. However, the guilty plea hearing transcript shows that Schidler pleaded guilty to four counts of child molesting, as Class A felonies. And the transcript from the sentencing hearing confirms that the guilty plea order initially entered was incorrect and that Schidler had actually pleaded guilty to four counts of child molesting, as Class A felonies. As a result, the trial court issued a guilty plea order nunc pro tunc correcting that sentencing error.

for his failure, if any, to investigate those reports. Schidler's contention on this point is without merit.

Finally, Schidler argues that his trial counsel was ineffective because he failed to interview "all potential witnesses." Id. at 5. In particular, Schidler contends that his trial counsel failed to interview Lora Rossiter. In an affidavit, Schidler's trial counsel affirmed that he had interviewed Ms. Rossiter and that she had stated she could not say whether she had ever seen Schidler and the victims together. In support of his argument for post-conviction relief, Schidler cites to Ms. Rossiter's affidavit, in which she states that Schidler's trial counsel never interviewed her.

But counsel's failure to interview or depose witnesses does not, standing alone, show deficient performance. Williams v. State, 771 N.E.2d 70, 74 (Ind. 2002). "The question is what additional information may have been gained from further investigation and how the absence of that information prejudiced his case." Id. Schidler does not state what information his trial counsel would have gained by interviewing Ms. Rossiter, if he had not, in fact, interviewed her before trial. Nor does Schidler state how the alleged failure to interview Ms. Rossiter prejudiced his case. Thus, Schidler's contention that his trial counsel was ineffective for failing to interview Ms. Rossiter is also without merit.

Issue Two: Ineffective Assistance of Appellate Counsel

Schidler next asserts that his appellate counsel was ineffective. Our supreme court has set out the standard of review for a claim of ineffective assistance of appellate counsel as follows:

> The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the petitioner must show

> appellate counsel was deficient in [his] performance and that the deficiency resulted in prejudice. To satisfy the first prong, the petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that counsel committed errors so serious that petitioner did not have the "counsel" guaranteed by the Sixth Amendment. To show prejudice, the petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.
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> * * *
>
> To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial review is highly deferential. Ineffective assistance is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on appeal. One reason for this is that the decision of what issues to raise is one of the most important decisions to be made by appellate counsel.

Overstreet v. State, 877 N.E.2d 144, 166-67 (Ind. 2007).

Here, Schidler maintains that his appellate counsel was ineffective for "[f]ailing to raise the claim of ineffective assistance of trial counsel as an issue on direct appeal because of trial counsel's failure to argue [Schidler's] excellent employment history as a [m]itigating factor during sentencing." Appellant's Brief at 8. Schidler acknowledges that his appellate counsel was able to secure a reduction in Schidler's sentence from 120 years to sixty years. But Schidler argues that "[i]t is reasonable to believe that appellate counsel should have been aware that to gain [Schidler] even further relief on direct appeal, it was absolutely necessary to raise the claim of ineffective assistance of trial counsel rather than blindly arguing the excellent employment history without any support . . . ." Id.

But, again, Schidler has not provided cogent reasoning to support his underlying argument that trial counsel's performance was deficient or that, but for trial counsel's alleged error, Schidler's sentence would have been different. Nor has Schidler provided cogent reasoning to demonstrate that his appellate counsel's performance was deficient for failing to assert the underlying ineffective assistance of trial counsel claim or, had such a claim been raised on direct appeal, that his sentence on direct appeal would have been different. Thus, Schidler has waived his claim of ineffective assistance of appellate counsel. See App. R. 46(A)(8)(a).

Issue Three: Prosecutorial Misconduct

Schidler contends that the deputy prosecutor violated Schidler's due process rights by striking the class of felony listed on the charging information during the guilty plea hearing. Specifically, he asserts that the deputy prosecutor "used an ink pen to strike out Class[]B felonies and add Class[]A felonies concerning the child molestation counts" and that those acts "so infected the guilty plea hearing with unfairness[] that the resulting conviction is unreliable." Appellant's Brief at 7. But Schidler does not provide citations in the record showing the existence of those handwritten amendments to the charging information. Thus, Schidler has waived this argument.[3] See App. R. 46(A)(8)(a).

Issue Four: Consecutive Sentences

Finally, Schidler contends that the trial court abused its discretion when it imposed consecutive sentences. He acknowledges that this court on direct appeal ordered a

[3] Schidler also contends, without analysis, that the handwritten amendment to the charging information was made in violation of Indiana Code Section 35-34-1-5. That statute governs the amendment of charging informations. But the amendment was made pursuant to a plea agreement and it was to Schidler's benefit. Thus, that claim is also without merit.

reduction of his 120-year aggregate sentence to sixty years. In the present case, he argues that he is entitled to post-conviction relief because certain mitigating factors, which were ignored by the trial court, warrant the imposition of concurrent sentences. We cannot agree.

The purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. Reed v. State, 856 N.E.2d 1189, 1194 (Ind. 2006) (citations omitted). A post-conviction petition is not a substitute for appeal, nor does it afford a petitioner a "super-appeal." Id. (citations omitted). Our post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions. Id. (citations omitted). If an issue was raised on direct appeal, but decided adversely to the petitioner, it is res judicata. Id.; Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007).

Here, Schidler raised on direct appeal the propriety of his consecutive sentences. In particular, he argued that the trial court abused its discretion when it imposed consecutive sentences, in part because his "excellent employment history" warranted the imposition of concurrent sentences. Appellant's Brief at 5. But this court addressed that argument on direct appeal, holding that the issue was waived because Schidler failed to argue his employment history as a mitigator at the sentencing hearing. Schidler I, slip op. at 7. Thus, the issue is res judicata. See Reed, 856 N.E.2d at 1194; Stephenson, 864 N.E.2d at 1028.

To avoid res judicata, Schidler appears to argue that this court has not addressed the particular claim presented in his petition for post-conviction relief. He notes that we

reviewed his sentence on direct appeal only for inappropriateness under Appellate Rule 7(B). He then points out that his "claim of error [is] that the trial court abused its discretion by sentencing [him] to serve consecutive sentences" and that a claim of an abuse of discretion is separate from a claim that a sentence is inappropriate under Appellate Rule 7(B). Appellant's Brief at 7. Thus, he concludes that "this particular claim for relief does [not] fall under the Doctrine of Res Judicata." Id. (alteration in original) (citation omitted). We cannot agree.

This court has explained the components of res judicata as follows:

> Claim preclusion is applicable when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim between the same parties. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action. Claim preclusion applies when the following four factors are present: (1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies.

Perry v. Gulf Stream Coach, Inc., 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007) (emphases added) (citations and internal quotations omitted).

Here, there is no question that this court had jurisdiction to render a judgment in Schidler's direct appeal, that the former judgment was on the merits, and that the direct appeal was between the same parties. And on direct appeal, this court addressed the same issue raised in Schidler's petition for post-conviction relief, namely, whether the trial court abused its discretion by imposing consecutive sentences despite its awareness of Schidler's "excellent employment history." Appellant's Brief at 5. There, this court held that Schidler had waived that argument because that mitigator had not been argued

to the trial court at sentencing. Schidler I, slip op. at 7. Thus, claim preclusion bars our review of this contention.

Conclusion

In sum, Schidler's claims of ineffective assistance of trial counsel are either waived or without merit. His claim of ineffective of appellate counsel is also waived. He has not shown facts to support his claim of prosecutorial misconduct, and review of his consecutive sentences is barred by res judicata. Thus, we affirm the trial court's denial of Schidler's petition for post-conviction relief.

Affirmed.

SHARPNACK, J., and DARDEN, J., concur.